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Nos. 17, 18 and 19.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

THE UNITED STATES OF AMERICA, *Appellant*,

v.

CRESCENT AMUSEMENT COMPANY ET AL., *Appellees*.

CRESCENT AMUSEMENT COMPANY ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, *Appellee*.

REPLY BRIEF FOR CRESCENT AMUSEMENT COMPANY ET AL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

Nos. 17, 18.

THE UNITED STATES OF AMERICA, *Appellant*,

v.

CRESCENT AMUSEMENT COMPANY ET AL., *Appellees*.

No. 19.

CRESCENT AMUSEMENT COMPANY ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, *Appellee*.

REPLY BRIEF FOR CRESCENT AMUSEMENT COMPANY ET AL.

PRELIMINARY STATEMENT.

The Government's case as set forth in its brief, is, as we analyze it, simply this:

(1) In each instance where a distributor made a circuit deal with a defendant exhibitor and included a town where the defendant had competition, it is a permissible inference that the distributor was influenced by the fact that it got

revenue from several towns instead of one town. Since the distributor may have feared that, unless the competitive situation were included in the deal, it would fail to obtain or retain the other business of the defendant, it is likewise a permissible inference that the distributor yielded to coercion or pressure when it included the competitive situation in the deal.[1]

(2) In each such case the deal made by the particular distributor with the defendant exhibitor necessarily reduced or limited the supply of films available to the competing exhibitor. This amounted to an unreasonable restraint of the latter's competition if the distributor did not give the independent the opportunity of competitive bidding.[2]

(3) It follows that, with respect to each such deal, there was an unlawful "combination" between the defendant exhibitor and the distributor to restrain the competition of the competing exhibitor.

Of course the keystone of the foregoing argument is the failure of the distributor to license films on a "local competitive basis" in each town where there were competing exhibitors. The argument is that an exhibitor is at a disadvantage in procuring films where his competitor owns more theatres in "closed towns". On this theory, it is obvious that every exhibitor in the United States who owns more theatres than his competitor in "closed towns" will necessarily violate the Sherman Act whenever a circuit deal is made, unless the exhibitor first demands and obtains evi-

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[1] The Government contends that documentary evidence in the record corroborates these inferences but that they are warranted even if the documentary evidence be held incompetent. (Gov. brief, p. 68)

[2] Elsewhere in the Government's brief (Footnote 56, p. 66), it is intimated that an unreasonable restraint results only if the defendant had been previously using the product of the particular distributor involved. On this theory it is necessary to examine only two situations, Brownsville, Tennessee, and Rogersville, Tennessee. Greeneville, Tennessee, need not be considered because there was no evidence of a "sell-away" by any distributor in that situation.

dence that his competitor has been given an opportunity to bid for the product.

We insist that the present theory of the Government is not the theory on which this case originally went to trial. It was not the case made out in the complaint and the bills of particulars; and we do not think it is a valid application of the Sherman Act.

It seems to us that before a violation of the Sherman Act on the part of the defendant exhibitors could properly be found, at least one of the following additional elements should have been present:

(a) Over-buying by the defendants for the purpose of preventing competitors from obtaining pictures;[3] or

(b) Contracts between the defendant exhibitors and the distributors unreasonably limiting the rights of the distributors to contract, completely and fully, with the other exhibitors, if they contract at all;[4] or

(c) Departure by the distributors from their established business methods and practices, coupled with evidence that this departure was induced by defendants for the purpose of restraining competition.[5]

None of these elements were present in the case at bar. Even if they had been present there would not necessarily have been a violation of the Sherman Act; but without any of these elements, we think the Government's case was clearly inadequate as a matter of law.

We shall now undertake to make specific reply to certain of the points made in the Government's brief.

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[3] The District Court regarded this element as important when he made a general statement of the applicable law in Conclusion 2, R. 1474. However, there was no evidence and no Finding that any such thing had occurred. (See our main brief, p. 44.)

[4] *United States* v. *Interstate Circuit* (D. C. Tex. 1937), 20 F. Supp. 868, 875-876.

[5] *Interstate Circuit* v. *United States* (1939), 306 U. S. 208, 218, 222-223.

"The Defendant Exhibitors—Their Affiliation and Monopoly Position":

(Gov. Brief, pp. 11-14)

It is incorrectly stated under this caption (p. 12) that Rockwood owns 50 per cent of the stock of "five other theatre corporations" in addition to 50 per cent of the stock of Cherokee and Kentucky. The Court made such a Finding but was asked to correct it.[1] It was partially corrected by Amended Finding 19.[2] It is also incorrectly stated (p. 12) that "Rockwood has operated as a virtual branch of the Crescent business." This is a mere inference improperly drawn from the facts stated in Footnote 11. The statement in the Footnote: "Individual theatres have been *transferred* from Crescent's subsidiaries to Rockwood," is correct, but only if it is meant that these theatres were *purchased* by Rockwood at their fair values.

The statement as to the increase in the number of theatres operated by Crescent and Cumberland (p. 13) is correct; but it should be pointed out that during the five-year period Crescent entered only five new towns[3] (not including Madison, Tennessee, which is a suburb of Nashville), and that Cumberland entered only three new towns. The principal expansion came about as the result of the organization of Rockwood which, with such of its affiliates as were made defendants, operate theatres in 24 small towns,[4] the majority with populations less than 2500.

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[1] R. 108.

[2] R. 1489. Plaintiff's counsel conceded that the correction should be made. R. 85.

[3] Brownsville, Tenn.; Earlington, Ky.; Franklin, Ky.; Gallatin, Tenn.; and Princeton, Ky. R. 1358.

[4] Rockwood 13; Cherokee 10; Kentucky 1. See R. 1361-1362. In our main brief, p. 116, it is said that the aggregate populations of the Rockwood and Cherokee towns were 83,242. This was a typographical error. The figure should have been 53,242. The average population was 2,315. A town of this size will not ordinarily support two competing theatres; and it is a fallacy to assume that the decree in this case will bring about such competition.

The statements as to growth in earnings and surplus of Crescent and Rockwood (p. 13) are also correct but, as we see it, are wholly irrelevant. The five-year period was one of rising industrial activity and "easy money." It is not unusual for surplus to increase in a greater ratio than earnings. For example, a corporation having a capital of $100,000 and a surplus of $1,000 will increase its surplus nine times by adding $8,000 to net worth. Nor is it unusual for a corporation to have earnings amounting to several times the original capital investment if it has started on a relatively small capital and relatively large borrowings.

In Footnote 14 (p. 14) it is suggested that screen advertising can be a source of revenue only where there is no competition in the town. There is no reason to think that two minutes of advertising in a two-hour program would adversely affect patronage in a competitive situation. There is nothing in the record in support of the argument made in the Footnote.[5]

The inference which is evidently invited from the statement of the expansion and earnings of the defendant exhibitors is that success is evidence of monopolization. We do not think this is a permissible inference. Substantial earnings may result from competent and efficient management. We refer the Court to Finding 111[6] and to the last paragraph of Amended Finding 113.[7]

[5] Since the argument is made, however, we think it fair to state that two minutes is the *maximum* permitted under the contracts with the advertising company. Many of these towns were too small to support even one theatre except for the fact that Stengel developed the technique of supplementing the operation with popcorn sales and screen advertising. R. 1275-1283, 1349, 1492-1493.

[6] R. 1428-1429.

[7] R. 1493.

"Elimination of Competition Through Use of Circuit Buying Power."

(Gov. Brief, pp. 14-20)

The first illustration given by the Government under this caption is with respect to Rogersville, Tennessee. This illustration is referred to in Footnote 15 (pp. 14-15).

The independent, Miller, had enjoyed a monopoly of exhibition in Rogersville. Cumberland's new theatre was opened in October, 1936. For the 1936-37 season, the evidence was undisputed[1] that Miller had film deals with Paramount, Warner, Columbia and Universal and the District Court found that he was also playing R.K.O. pictures.[2] Nevertheless the Government insists that Miller's competition was unreasonably restrained when United Artists made a deal with Cumberland.

The first coercion or pressure was that exercised by United Artists on Cumberland, in refusing to license pictures to Cumberland for its Rogersville theatre unless Cumberland also licensed the product for the theatres in its other towns. The only coercion or pressure deemed important by the District Court and the Government was Hill's demand that, after the deal had been made, it be approved as a whole or not at all.[3] The fact that Miller had the product of five out of the eight major distributors is deemed immaterial.

After referring to the Rogersville situation, the Government's brief proceeds (pp. 14-15):

> "Where, as in this case the circuit's policy is to absorb competitors, the demands will include restricting the independent's ability to license films to the extent necessary to prevent him from offering effective competition."

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[1] R. 430-432, 439-442.

[2] 1387.

[3] R. 1384, 1478. The practice is for the local salesman or exchange manager to agree with the exhibitor upon a deal which is then subject to final approval at the distributor's New York office before it becomes a contract.

No citation to the record or to any Finding of the District Court is made in connection with the foregoing statement. Evidently the Government has in mind not what was actually done in the case at bar, but rather a potential danger to independents.[4] There was no evidence in the case at bar of any "demand" by any defendant exhibitor which had any reference to the ability of its competitors to license films. All that the defendants did was to license the films which they themselves needed and actually exhibited in the normal course of business.

It is next stated, however, that "competitors were eliminated after the defendant exhibitors had, through their circuit buying power, *succeeded* in limiting the supply of films."[5] Success implies effort directed toward the accomplishment of an aim. In the case at bar, as heretofore pointed out, there was no evidence that the defendant exhibitors, in the licensing of films for their own use, had any aim other than the exhibition of pictures to their own patrons in normal course. There was no over-buying and no attempt to do anything which would limit the supply of films available to competitors.[6] Of course the effect of each licensing agreement was to limit the supply of films available to the competitor. It would be impossible to make a film deal without this result.

The fact that the defendant exhibitors afterward purchased the theatres of several of these competitors does not prove that the defendants licensed films for the purpose of

[4] In this connection see also p. 66 of the Government's brief where it is said that "effectuation of the conspiracy" need not be shown. This is technically true, but in the case at bar the conspiracy itself was never proved. The District Court merely drew an inference or legal conclusion that various "combinations" existed between particular exhibitors and particular distributors. The inference of a combination was, in each instance, drawn from a prior inference that the competition of a particular independent had been unreasonably restrained. If the basis for the inference or conclusion is removed, the inference or conclusion must also fall.

[5] All italics in this brief are ours.

[6] See Main brief, pp. 43-45.

forcing the competitors to sell. When there has been only one theatre in a town, such as Miller's theatre in Rogersville, the people of the town must go to that theatre to see motion pictures. When Cumberland built its new theatre the people had a choice. Miller's theatre was a makeshift affair with no modern conveniences. It was quite natural for many of his former patrons to attend the new theatre; and it was quite natural for Miller to desire to sell his theatre after he had lost his monopolistic position in the town. Miller was not forced to sell because of a shortage of product. On the contrary, he testified he had "plenty of pictures at the price."[7]

The facts were substantially the same in the other instances set forth in Footnote 16 (Gov. Brief, p. 16). For example, in Brownsville, Tennessee, the independent, Lawing, commenced to lose money as soon as the new Crescent theatre was opened in 1935. At this time Lawing had not completed his 1934-1935 contracts; and the sufficiency of his product is attested by the fact that he never did comply with his contracts with United Artists and Columbia and was very slow in complying with his contract with Loew's even after he was granted a reduction in film rentals.[8]

In short, it was not any limitation of the supply of films which induced these independents to sell out their theatres. It was merely the fact that competition took away or reduced the profits they had formerly enjoyed.[9] In towns which are not large enough to support two competitive theatres, one of them must inevitably fail.

The Government, in its brief (p. 18), regards the three franchise agreements as illustrations of "circuit buying

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[7] R. 442.

[8] R. 315, 323-324, 757-761.

[9] As to Earlington, see our main brief, pp. 31-32, 41. In McKenzie, the independent sold to Rockwood before the latter had opened a theatre or even negotiated for product. R. 1221-24, 1388. Paris is discussed in our main brief, pp. 80-82; Hopkinsville, pp. 32-33; and Union City, pp. 33-34. Athens is not involved because Muscle Shoals Theatres did not appeal.

power." As to the Paramount franchise, the evidence was that Paramount had broken a promise to Sudekum regarding the Nashville theatre, (or so Sudekum regarded it),[10] and Sudekum had done no business with Paramount since that occurred. We think this could be more properly regarded as the exercise of a not unusual human trait rather than as the exercise of "circuit buying power." As to the Fox franchise, it is true that in the preceding season Fox had been unable to sell Crescent at the film rentals demanded by it. Failure to make a deal is not unusual in the business world when the purchaser thinks the price is too high and the seller thinks the offer is too low. The statement that the independents paid higher film rentals than the Sudekum theatres under the franchise is not supported by competent evidence.[11] As to the Warner franchise, the Government does not assert that its execution was the result of circuit buying power, but refers to the elimination of "potential" theatre competition between Crescent and Warner in Nashville, a city which was expressly excluded from the scope of the complaint.[12]

In concluding the discussion of "elimination of competition through use of circuit buying power," the Government refers to the fact that Paramount gave the Crescent theatre in Madisonville, Kentucky, clearance over Dozier's theatre in Earlington, Kentucky, and that Loew's licensed its 1935-1936 product to Crescent in Brownsville instead of to Lawing. Quotations are made from two letters obtained by the Government from the files of Paramount and Loew's respectively. We respectfully refer the Court to our discussion of these situations in our main brief.[13]

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[10] R. 1028. The reference made in the Government's brief to the finding as to Paramount's "general policy" is based on Agnew's testimony, R. 1323, 1334-1335. The witness's statement as to "exceptional circumstances" (R. 1335) had reference to Nashville which was not involved in this case. Footnote 12, Gov. Brief, p. 12. This is the Government's only claim of departure by any distributor from its "general policy" or established business practices.

[11] Main brief, pp. 139-140.

[12] Footnote 12, Gov. Brief, p. 12.

[13] Main brief, pp. 73-74 as to Earlington; pp. 55-59, 69-72 as to Brownsville.

"This Court Has Jurisdiction Either of the Appeal in No. 17 or that in No. 18."

(Gov. Brief, pp. 26-33)

The Government's brief substantially concedes the prematurity of the appeal in No. 17. We think that undoubtedly it was premature. Moreover, this appeal was not perfected within the time allowed. The Government procured successive orders extending the time for docketing the record, but the last order expired on December 25, 1943, and the record was not filed in this Court until February 1, 1944.

It is contended by the Government with respect to No. 18 that if two appeals are taken "determination of the absence of jurisdiction under one establishes the appellate jurisdiction under the other" (p. 31). We do not think the cases cited by the Government establish this proposition. They merely establish the authority of this Court, when it dismisses an appeal improperly taken to this Court instead of to the Circuit Court of Appeals, to frame the mandate so as to preserve to the appellants their proper remedies; and if appellants simultaneously appealed to the proper court, this Court may sanction that appeal rather than direct the entry of a new order in the district court from which a new appeal may be taken. This authority will ordinarily be exercised only where the jurisdictional question has not been "obviously settled by prior decisions". (*Phillips* v. *United States* (1941) 312 U. S. 246, at p. 254). We think that this Court in *Leishman* v. *Associated Wholesale Electric Co.* (1943) 318 U. S. 203, removed any substantial doubt as to the practice where motions to amend Findings have been filed.

It is also contended by the Government, with respect to No. 18, that the court from which an appeal is taken does not lose jurisdiction until the record is docketed in the appellate court. We think the Government is mistaken in this contention. In *Midland Terminal Ry. Co.* v. *Warinner* (C. C. A. 8, 1923) 294 Fed. 185, it was held that a writ of

error was fully perfected when the petition for the writ and the assignment of errors were filed, the writ allowed and issued, and supersedeas bond approved and filed and the citation signed. A second writ of error was accordingly dismissed. In that case the record was not filed in the Circuit Court of Appeals until long after the second writ of error had been allowed. In *Miller* v. *United States* (C. C. A. 7, 1940) 114 F. (2d) 267, it was held that under the new Rules of Civil Procedure the district court loses jurisdiction upon the filing of the notice of appeal.

We think the proper practice in the case at bar would have been for the District Court to have refused the second petition for appeal except on the condition that the Government dismiss the former appeal. Only five days before this second petition for appeal was presented the Government had procured the entry of an order extending the time for filing the record in the first appeal until December 25, 1943. Of course, the Government could have proceeded with this appeal and invoked action on the motion to dismiss it. But the Government elected to appeal a second time while its first appeal was pending and a motion to dismiss it was undisposed of. We do not think a practice of this nature should be sanctioned. The party who has prayed and been allowed one appeal should be precluded from obtaining another appeal until the first appeal is either abandoned, vacated or dismissed. This is merely an application of the general principle which precludes a party from "blowing hot and cold" by maintaining inconsistent positions in a judicial proceeding. Cf. *Wachstetter* v. *State*, 42 Ind. 166.

If this Court approves the practice advocated by the Government, it will be an open invitation for successive appeals whenever there is the slightest doubt as to the finality of a judgment. Such appeals will, as a practical matter, deprive the district court of jurisdiction because the jurisdiction will never be settled until the appellate court determines it retroactively.

"The District Court Erroneously Failed to Impose as a Condition on the Acquisition by a Defendant Exhibitor of any New Theatre that it First Affirmatively Justify the Acquisition."

(Gov. Brief, pp. 33-43)

Under this heading the Government insists on a revision of paragraph (19) of the decree so as to require the District Court to pass upon whether the acquisition of additional theatres would "unreasonably restrain competition."

The Government in its brief (Footnote 26, p. 34) refers to the "elimination of competition" by defendant exhibitors. It is said that competition was eliminated in twenty towns. This elimination of competition, to the extent that there are specific Findings,[1] may be put into categories and illustrated as follows:

(1) Brownsville, Tennessee.[2] Here the independent was operating a makeshift theatre on a shoestring. Crescent built an up-to-date theatre in the town. Lawing commenced to lose money as soon as the Crescent theatre opened.[3] He wanted to sell out, and Crescent bought the theatre and closed it. We assume that the word "acquisition" does not refer to the building by Crescent of the new theatre in Brownsville, but rather to the purchase of Lawing's theatre.

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[1] There are no specific Findings as to Huntsville, Fayetteville or Gadsden. See Exhibit B, Gov. Brief, pp. 78-79. All the other situations referred to in Footnote 26, with the exception of Athens and Copper Hill, are discussed in our main brief. (See pages iv-v, Table of Contents, for page references.) Athens is not discussed because Muscle Shoals Treatres, the defendant exhibitor there involved, was not affiliated by stock ownership with any other defendant exhibitor and did not join in the appeal. At Copper Hill the exhibitor involved was Newport Amusements, Inc., in which half the capital stock is owned by Cherokee and the other half by J. W. Baird. This corporation was not made a defendant.

[2] Main brief, pp. 29-30 and 52-53.

[3] R. 315-317.

(2) Union City, Tennessee.[4] Here the independent, John Dee Henry, opened a second-run theatre at a time when Crescent's second-run theatre was temporarily closed because it was being occupied as a temporary court house while a new court house was under construction. A short while previously he had sold a theatre in his home town of Hickman, Kentucky and had told the purchaser, whom he had solicited to make the purchase, that he wanted to get out of the theatre business and devote his time to his insurance and mortgage loan business. When Henry's plans to open his theatre in Union City became known, Crescent also opened a new second-run theatre. After operating his theatre in Union City for a short while, Henry approached Crescent and offered to sell. The deal was made and Crescent purchased the theatre and closed it.

(3) Central City, Kentucky.[5] In this town the Selba Amusement Company operated a first-run theatre and Pittman operated a second-run theatre.[6] The Selba theatre was incompetently managed and Pittman, largely for that reason, had a profitable operation. The Selba Amusement Company offered its theatre for sale and Rockwood purchased it. Pittman immediately approached Rockwood and asked Rockwood to purchase his theatre too. He testified that he did not believe that he could operate it successfully in opposition to the Selba theatre under a competent management.[6] Rockwood purchased the theatre and employed Pittman as manager for the Selba theatre. It continued to operate the other theatre on a part time basis.[7]

The theatre acquisitions which fall into category (1) were, (in addition to Brownsville), Rogersville, Tennessee, Gregneville, Tennessee, and Earlington, Kentucky. These were situations where the independent was first in the town and was operating a first-run theatre.

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[4] Main brief, pp. 33-34 and 92-93.
[5] Main brief, pp. 36-37 and 111, Footnote 6.
[6] R. 284-285, 296.
[7] R. 287.

Several of the theatre acquisitions fall into category (2), where the independent opened a second-run theatre in opposition to an existing theatre or theatres operated by the defendant exhibitors, e.g., Hopkinsville, Kentucky; Paris, Tennessee; and Maryville, Tennessee. On the other hand there were instances where the independent opened such theatres and did not sell out to defendant exhibitors but finally closed the theatres, e.g., Tim Smith (Peerless Enterprises), in Morristown, Tennessee.

Category (3) is in its essence not distinguishable from category (2). In Central City, Kentucky, the independent desired to sell out because he did not think he could compete successfully. Such was also the case in the towns where the independents opened opposition theatres and subsequently decided that they would prefer to sell.

It is said in the Government's brief (p. 34) that the District Court found that defendants had, in several other towns

> "made various threats, sometimes supplemented by film licensing discriminations, in an attempt to induce the sale to them of independent theatres."

These independent theatres are listed in Footnote 28. An examination of the Findings discloses no "film licensing discriminations" against these independents. In none of these towns, with the exception of Gallatin, did the defendants ever operate a theatre; and the Finding as to Gallatin related to 1929 or 1930, long prior to the period involved in this case. What was done in all these instances was to inquire of the owners whether or not they wanted to sell. They all replied in the negative and that was the end of it. They are all still operating their theatres and only in Gallatin is there competition.

In other towns, as well as Gallatin, independents have continued to operate theatres in opposition to defendants.

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* Finding 87, R. 1412. Roth's inferior theatre was an open invitation to competition. Cf. Morgan's letter quoted in Finding 88, R. 1414, and Avey's letter quoted in Finding 89, R. 1417.

e.g., Franklin, Kentucky, where the independent was there first; and McMinnville, Tennessee and Harriman, Tennessee, where defendants were there first. Suppose that one of these independents should decide that he wants to sell his theatre. What criterion is the District Court to consider and follow if one of the defendants desires to purchase it?

It was the view of the District Court that it was proper for defendant exhibitors to acquire additional theatres except where, prior to the acquisition, there had been a "violation" of the Sherman Act which unreasonably restrained the competition of the independent and forced him to sell. The District Court took the view that such a "violation" occurred whenever a distributor discriminated against the independent in the licensing of films. Such discrimination by the distributor was evidently regarded as "predatory tactics" on the part of the beneficiary of the discrimination and a sale under such circumstances was regarded as not "voluntary." Hence the District Court in paragraph (19) of the decree enjoined further acquisitions of theatres where the sale is not voluntary or, expressing the same thought differently, where "predatory tactics" are employed. If paragraph (19) is to be revised, we think it should be revised merely to require the District Court to determine whether the purchase by a defendant exhibitor of the proposed additional theatre is in violation of the decree as it now stands and as it may be otherwise modified by this Court.

It should be noted that the revised paragraph (19) upon which the Government now insists corresponds with paragraph (20) of the proposed decree submitted by the Government after the Findings and Conclusions were filed.[9] On the hearing as to the form of the decree, the following colloquy[10] occurred between the District Judge and plaintiff's counsel:

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[9] R. 26, 1479.

[10] R. 59.

"Mr. Wright: Well, paragraph 20 again was put in this decree in order to comply with conclusion of law No. 20 of your Honor's decision.

The Court: Yes, sir, but I am not entirely satisfied in my own mind that I should have had that in the conclusion. *I adopted that from the proposed conclusion which you submitted* but what is the necessity for such a provision?

Mr. Wright: Well, the necessity for the provision lies in the fact that the decree's purpose is preventive and the only way that you can make it effective from the standpoint of preventing a recurrence of situations that have been condemned by the findings is to insist that before these defendants move into another situation that the matter be presented here.

The Court: Do you mean that I sit down here and supervise from now on the activities of the Crescent Amusement Company as to whether or not they should open up theatres in other towns?

Mr. Wright: Oh, not at all. I assume that the purpose of this is to prevent an expansion by the Company and whether there would be any occasion to use that proviso would be entirely up to them. If they were content to remain in the same places, the same size territory, there would be no occasion ever to resort to this Court, but certainly, in view of what has happened, there ought to be some prohibition against further expansion on their part.

The Court: Well, wouldn't they be entitled to extend their business so long as they didn't violate the Sherman Act?

Mr. Wright: No. In view of the history that was shown here, I would have said again that we were entitled, on the basis of these findings, to a flat prohibition against further acquisitions. This is a qualification again, which, it seems to me, is for their benefit."

In urging that there should be an affirmative showing that a new acquisition would not "unreasonably restrain competition", we think the Government is reading into the Sherman Act language which is not there. In his dissenting opinion in *Northern Securities Co.* v. *United States* (1904),

193 U. S. 197, 403, Mr. Justice Holmes cautioned against this type of reasoning, saying:

> "The first section makes 'every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations' a misdemeanor, punishable by fine, imprisonment or both. Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the act. The court below argued as if maintaining competition were the expressed object of the act. The act says nothing about competition. I stick to the exact words used."

In undertaking to justify the proposed revision of paragraph (19) of the decree, the following statement is made in the Government's brief (pp. 40-41):

> "Protection of the general consuming public against the evils associated with monopolization of trade, such as high prices and limitation of product, is a primary objective of the Sherman Act, and the statute must be applied in the light of this objective."

In the case at bar there was no allegation, evidence or Finding that defendant exhibitors fixed admission prices in "closed towns" in excess of what was reasonable or in excess of normal admission prices charged by other exhibitors throughout the territory involved; nor was there any allegation, evidence or Finding that defendant exhibitors failed to exhibit the best pictures. On occasions certain of the defendant exhibitors were unable to agree with certain distributors on film rentals for particular seasons; and during the three-year period, 1932-1935, Crescent did not make deals with Paramount because of a disagreement between that company and Sudekum. With these exceptions there is nothing in the evidence to suggest that it was not the established practice of defendant exhibitors to exhibit the best pictures of each distributor. For the 1938-1939 season it affirmatively appears that not only did Crescent

and other defendant exhibitors have franchise agreements with Paramount, Warner and Fox, but they also had deals with the other five major distributors so that, in the so-called "closed towns", (viz. small towns where defendants operate the only theatre or theatres), the theatre-going public had the opportunity of seeing the best pictures of each distributor.[11]

This belated contention based on the public interest represents a shift from the theory of the complaint which was concerned only with so-called independent exhibitors. Paragraph 48(a) of the complaint (R. 8) attacked licensing contracts which gave defendants the privilege of selection. Selective deals permit the exhibitor to select and play the best pictures and eliminate the others. Good and efficient service to the public involves exhibition of the best pictures in good theatres and at reasonable admission prices. Such service is naturally a deterrent to competition. But if and when competition enters a town, the distributors will, in their own interest, take advantage of the competition to license their inferior pictures as well as their good pictures. It is at least arguable whether or not the public is thereby benefitted.

The evidence demonstrates that the monopolies of defendant exhibitors in the small towns involved in this case have resulted merely from the excellence of the service furnished the public. That such is the case is impliedly recognized in Finding 111 and the last sentence of Amended Finding

[11] See Finding 32, R. 1368-1369. As to United Artists, see Finding 165, R. 1466. It should be noted that United Artists is not itself engaged in the production of motion pictures but distributes pictures produced by others such as Selznick, Hal Roach, Wanger and Goldwyn. While Finding 165 emphasizes the difficulty which United Artists had in making deals with defendant exhibitors, the blame for not reaching a speedy agreement should not fall on the purchaser any more than on the seller who demands a figure which the purchaser thinks is too high. Why should a distributor such as United Artists (referred to in Finding 169, R. 1467-1469, as a "cooperative venture"), which acts as a common selling agent for a group of producers, stand in a more favorable light than a "combination" of exhibitors?

113.[12] Where adequate entertainment is being furnished the public, there is little or no incentive for competition. In the cases in which defendant exhibitors entered towns where independents had monopolies it appeared in every instance that the independent had been operating in a wholly inadequate theatre, e.g., Rogersville, Tennessee; Brownsville, Tennessee; and Greenville, Tennessee.[13]

The suggestion is also thrown out (Gov. Brief, p. 41. Footnote 34) that "local management" is to be preferred over "chain operation". Again there is no basis in the record for such an argument. Sudekum has been a lifelong resident of Tennessee.[14] Local management has been provided the various theatres.[15] On the other hand, there is no evidence that the so-called independent exhibitors whose competition was allegedly restrained had been residents for any substantial length of time of the towns in which they operated theatres. For example, Lawing rented a home in Brownsville when he opened a theatre there, but moved away shortly after he sold the theatre.[16]

In short, it seems to us that the Government's argument, not only with respect to this feature of the case but with respect to the case as a whole, is based on assumed or hypothetical facts, rather than on facts in the record, or even in the Findings, although these Findings were themselves copied, in the main, from plaintiff's brief in the District Court.[17] An argument based on unwarranted inferences and unproven assumptions is necessarily unreliable.

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[12] R. 1428-1429, 1493.

[13] Main brief, pp. 52-53.

[14] R. 944.

[15] One objection to "chain operation" is that managers are shifted when they become well acquainted with their customers or patrons. Sudekum follows a contrary policy. R. 960-964.

[16] R. 320; 329.

[17] R. 1522.

"The District Court Properly Required Separation in Ownership and Control of the Defendant Exhibitors."

(Gov. Brief, pp. 43-51)

Under this caption it is said in the Government's brief (p. 44):

> "It is likewise undisputed that these corporations have combined with each other in various ways to suppress competition. They have agreed upon a division of operating territory and have combined with each other and with certain distributors in licensing films and making franchise contracts for the purpose of maintaining their theatre monopolies and preventing competition (Conclusions 10, 11, 13; R. 1476-7)."

On the contrary this statement is most vigorously and earnestly disputed. It is true that some of these corporations have at times "combined with each other" in that, in some instances, licensing agreements have been jointly negotiated. These instances are listed in Finding 32[1] and also under the caption "E—Franchises".[2] These joint deals were not made, however, for the purpose of suppressing the competition of any independent. There is no Finding to that effect with respect to the deals listed in Finding 32; and the vice found in the franchises was not the joint negotiation but the other features which are discussed elsewhere in the briefs. The District Court held in Conclusion 18[3] that blanket contracts made by United Artists Corporation for the 1938-1939 and 1939-1940 seasons were not objectionable, although they were joint deals.

It is also true that Conclusion 13[4] reads as follows:

> "13. The said defendant exhibitors have violated the Sherman Act by combining with each other, and with the major distributors, Paramount, Fox, Warner,

[1] R. 1368.
[2] R. 1430-1457.
[3] R. 1478.
[4] R. 1477.

Loew's, RKO, and United Artists, in licensing films for the purpose and with the effect of maintaining their theatre monopolies and preventing independent theatres from competing with them."

However, when Conclusion 13[5] is considered in conjunction with Conclusion 9[6] and with the portion of Conclusion 17[7] relating to Rogersville, Tennessee, it is apparent that the District Court merely meant by Conclusion 13 that each of the alleged illegal "combinations" was between one defendant exhibitor and one distributor, except where the particular film deal happened to be one in which another defendant exhibitor participated. The combination involving Rogersville, Tennessee, was between Cumberland and United Artists in 1936-1937 and in 1937-1938, and between Rockwood and United Artists in 1938-1939. This is made clear by examining Findings 32, 52 and 165-166[7] from which it appears that Cumberland made no deal with United Artists in conjunction with any other defendant exhibitor. Again, in Brownsville, Tennessee, the deal made by Loew's with Crescent for the 1935-1936 product was not the result of any combination between any of the defendant exhibitors. Actually it was not even a circuit deal by Crescent itself. Finding 43[8] merely says that "at *approximately* the same time, Loew's licensed that season's product to Crescent for exhibition in 16 other towns".

As to the franchises, there is no suggestion in the evidence or in the Findings that the "combination" among some of the defendant exhibitors in negotiating these franchises was for the purpose of putting pressure on the distributors with respect to any competitive situation. We

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[5] R. 1476.

[6] R. 1477.

[7] R. 1368, 1384-1386, 1465-1467. (The phrase "hereinafter mentioned" in the last paragraph of Finding 166 should have been "hereinbefore mentioned," because reference was evidently intended to Finding 52.)

[8] R. 1375.

see no difference from this standpoint between these franchise agreements and the United Artists' blanket deals which were expressly held valid by the District Court. Conclusion 10[9] of the District Court must be construed in *pari materia* with Conclusion 13 except to the extent that a distinction is made between one-year deals and deals for several seasons.

As to Conclusion 11[10] of the District Court that the defendant exhibitors had combined with each other "for the purpose of dividing the territory in which theatres may be operated by any of them pursuant to implied agreements among themselves", we have never understood the meaning of this language which is a rewording of paragraph 46[11] of the complaint. That there has been no division of territory is perfectly apparent when the locations of the theatres of the different defendant exhibitors are considered.[12] Conclusion 11 goes beyond Finding 28[13] which is the only Finding mentioning division of territory. All that Finding 28 means is that no two of the defendant exhibitors have theatres in the same town.

The Government further says in its brief (p. 45) that unless divestiture takes place

> "there will be both opportunity and tendency for these exhibitors to support each other in their dealings with distributors in obtaining unfair and unwarranted advantages over independents."

All that this statement can mean is that defendant exhibitors may, by the use of so-called "circuit buying power", resist more successfully than independents the demands of the distributors for increasingly high film rentals and onerous terms. The remedy of the independent is to

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[9] R. 1476.
[10] R. 1476-1477.
[11] R. 7-8.
[12] R. 230, 233.
[13] R. 1365.

join a cooperative or to combine, in some other way, with other exhibitors in negotiating with the distributors. We think the public interest would be better served in that way than by breaking up the independent circuits and cooperatives for the advantage of the distributors.

It is argued by the Government (pp. 47-48) that the divestiture provisions are proper because the subsidiary corporations, and particularly Cumberland and Lyric, were formed "as an incident to elimination of competition". Reference is made to Finding 24.[14] Of course, competition is eliminated when two competitors form a partnership or a corporation. Such elimination of competition, especially where the parties are engaged in a local business such as the exhibition of motion pictures, does not amount to an unreasonable restraint on interstate commerce. There is no Finding that the organization of these corporations was illegal. There is merely a Finding of the obvious fact that there was an elimination of competition. The District Court used the phrase "relieved themselves of the necessity of continuing to compete with each other", copying this language from plaintiff's brief.[15]

It is next argued by the Government that the divestiture provisions of the decree "will leave each defendant exhibitor with far greater resources than any competitor and it will also be left with a substantial territorial monopoly". This argument is not based upon any facts found in the record. Lyric will be left with theatres in only the town of Huntsville, Alabama (population 13,050); Kentucky will be left with theatres only in the town of Elizabethtown, Kentucky (population 3667); Rockwood will be left with theatres in 13 towns, all but three having populations of less than 3,000; Cherokee will be left with theatres in 10 towns, all but three having populations of less than 3000;

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[14] R. 1363.

[15] R. 1522.

and Cumberland will be left with theatres in 10 towns whose 1940 populations varied from 1500 to 5300.[16]

It is next argued by the Government that in a suit to require one corporation to divest itself of a 50 per cent ownership in the capital stock of another corporation, the other 50 per cent owner is not a necessary party. However this may be, the Government misunderstood our argument (our main brief, pp. 124-126). This procedural contention as to necessary parties was made only with respect to Newport Amusements, Inc., and Ruffin Amusements, Inc., which were not made defendants in the case. The Government apparently does not controvert our position with respect to these two corporations.

"The Provisions of the Judgment Relating to the Making of Franchise Contracts Are Appropriate and Necessary."

(Gov. Brief, pp. 51-54)

Under this heading the Government says (p. 53):

> "When, as in this case, the contracts run for periods of several years and give this exclusive supply to affiliated corporations themselves operating theatre chains, the restraint on competition is clearly unreasonable and illegal."

No citation of authority is given in support of the statement that a licensing agreement for a period of several years is illegal because of the period of time which is covered. Where one picture is licensed by a distributor to an exhibitor, no other exhibitor can license that same picture for exhibition in the same town on the same run. This is a contract for "exclusive supply" of that one picture in

[16] R. 1360-1362. Neither Crescent nor any of these other corporations operates theatres in the larger towns or cities in Tennessee, other than Nashville. R. 1358-1363. These other towns and cities are Memphis, Knoxville, Chattanooga, Jackson, Johnson City and Bristol.

the sense in which the phrase is used in the Government's brief. If the agreement is for a season's product or for the product of two or three seasons, the same result follows. Again, where a building is leased for one year, no one else can lease that same building for the same year. The supply of buildings in the town available for other tenants is thereby limited. If the lease is made for five years or ten years instead of one year, a similar result follows just as in the case of contracts for the licensing of films.

Obviously there would be an unreasonable restraint on competition if the defendant exhibitors had, either by making franchise agreements or by making deals for one year only, licensed more pictures than they needed for normal exhibition in their own theatres with the purpose of preventing competitors from obtaining them. But such was not the case and it is not contended that there was any over-buying. As a matter of fact the defendant exhibitors never had franchise agreements with more than three of the eight major distributors. The supply of films available to competitors was limited only to the same extent as would have been the case if defendant exhibitors had, at the beginning of each season, licensed an equivalent number of pictures from these same distributors or from other distributors.

In the *Interstate Circuit* case this Court stressed the fact that each of the eight distributors "knew that cooperation was essential to successful operation of the plan". (306 U. S. 226) In this case, too, each distributor must have known that a combination with defendants, to which the other distributors were not parties, could not be effective in suppressing independent competition. It would have been necessary to have a plan and the cooperation of the other major distributors. Actually there was no plan and no cooperation. The Government disclaimed any such contention when it eliminated paragraphs 50-53, incl., of the complaint.[1]

[1] R. 9. 19.

The argument is made (Gov. Brief, p. 53) with respect to the repeat-run clauses in the franchises: "The effect of this was practically to bar competitors from even second-run exhibition of the distributor's pictures". We deny that this was true and refer the Court to the discussion in our main brief (pp. 127-129). The reference made in the Government's brief (p. 54) to "clearance provisions respecting second-run showings" is misleading. The only clearance provisions were with respect to other towns. There were no provisions fixing the length of time between runs in the same town. Nor was there any instance in the case at bar where the independent "second-run" theatre in a particular town was superior to the defendant's "first-run" theatre or where, for any other reason, the independent merited a switch in the runs established by any distributor.

"The Provisions of the Judgment Preventing Use of Circuit Buying Power to Restrain Competition Are Appropriate and Necessary."

(Gov. Brief, pp. 55-59)

Under this heading paragraphs (8) and (12) of the decree are discussed. It is argued (p. 55) that if A (the circuit) "can threaten" not to license a distributor's pictures in his closed towns unless he receives the distributor's pictures for first-run showing in a town in which A and B both operate theatres (B being the independent), and irrespective of whether B makes an equal or better offer, "such tactics, provided the distributor yields to A's pressure, completely eliminate all competition between A and B for first-run exhibition of the distributor's films".

The only Finding by the District Court where any such "threat" was said to have been made was with respect to Rogersville, Tennessee, where United Artists yielded to Cumberland's "pressure". In that case, as already shown, United Artists made a circuit deal with Cumberland, in-

cluding Rogersville. The Finding is to the effect that United Artists then proposed to eliminate Rogersville from the deal, and Cumberland insisted that the deal be approved as a whole or not at all.[1]

It is true that, in other situations, the District Court apparently drew the "inference" of similar pressure, but there was no evidence, even of the hearsay type, of any threat not to license the distributor's pictures in the closed towns unless the competitive situation was included. The evidence relied upon by the Government consisted of inter-office communications taken from the distributors' files in which reference was made to the large amount of revenue which the distributor was procuring from defendant exhibitors as compared with the revenue which would be obtained from independents. In all these situations, however,—and we do not except Rogersville,—it was an equally permissible inference that the distributor would have dealt with the circuit rather than the independent even if no other revenue had been involved. Indeed this inference is far more logical than the contrary inference when there are taken into consideration the facts contained in Findings 111 and 112.[2]

The attention of the Court is particularly directed to the last paragraph of Finding 112 to the effect that where licensing agreements were made with the independent exhibitors the distributors found it necessary "to make large concessions from the contract terms originally agreed upon, or to accept cancellations of obligations to exhibit pictures as originally called for under the contract". For example, Lawing, at Brownsville, Tennessee, failed to play pictures which he had licensed from United Artists and Columbia[3] and, according to a letter written to Lawing by Willingham (Loew's District Manager at Memphis), Lawing's account with Loew's was "in a most deplorable condition".[4]

[1] R. 1384.
[2] R. 1428-1429.
[3] R. 323-324.
[4] R. 759-760.

Nevertheless the Government insists that there was an unlawful discrimination by Loew's against Lawing because the following season's product was licensed to Crescent in spite of an offer from Lawing which was "as good as, if not better than" the deal Loew's accepted from Crescent. Assuming that Lawing's offer was, on its face, as good as Crescent's offer,[5] it was natural for Loew's to prefer to make a deal which would be carried out by the exhibitor rather than one which would probably not be carried out.

The Government's brief then proceeds (p. 56):

> "Similar threats and pressure may exclude B from even second-run exhibition or result in clearance provisions so burdensome to B as to render his competition ineffective. Such use of a local monopoly of exhibition *to obtain agreement by a distributor* to impose restraints upon the exhibitor's competitors is a restraint of trade prohibited by the Sherman Act. *Interstate Circuit, Inc. v. United States*, 306 U. S. 208, 227, 229-230."

While we do not quarrel with the foregoing statement of the law, there was no Finding and no evidence in the case at bar that any defendant exhibitor ever *obtained agreement by any distributor* to impose restraints upon competing exhibitors as in the *Interstate Circuit* case. The decision of the District Court in that case with respect to such an agreement between an exhibitor and a distributor was stated as follows (20 F. Supp. 868, 875-6):

> "The distributor respondents have the legal right to contract for the exclusive exhibition of their copyrighted pictures to the respondent exhibitors . . . They must not, in their contracts with the exhibitor respon-

[5] Actually it was not as good. See pp. 57-58 of our main brief. As there stated, Exhibit L-18, which included Lawing's offer, was not brought up with the record on appeal, and in the Government's brief (p. 74), it is argued that defendants are therefore not in position to attack the finding as unsupported by evidence. In view of this technical insistence, the Court's attention is called to the fact that Exhibit L-18 was merely identified and was not offered or received in evidence (R. 777).

dents, contract away their right to contract, completely and fully, with other exhibitors, if they contract at all."

In the case at bar each distributor merely made contracts with one or more defendant exhibitors for the exhibition of its copyrighted pictures, and such contracts may be said to have been for "exclusive exhibition" in the sense previously used. That is to say, when a distributor licensed a first-run to an exhibitor, it could not license the same run to another exhibitor in the same town. Furthermore, the distributors simply followed their own established business practices and methods with respect to second-run contracts in those towns, and made no contracts with any defendant exhibitor which contracted away their rights to contract with other exhibitors.

This Court in the *Interstate Circuit* case laid great stress upon the fact that the distributors had complied with proposals which "involved a radical departure from the previous business practices of the industry and a drastic increase in admission prices of most of the subsequent-run theatres" (306 U. S. 222); that they put into effect "far-reaching changes in their business methods" (306 U. S. 223); and that the restrictions imposed upon the competitors of the defendant exhibitors "did not have their origin in the voluntary act of the distributors or any of them" (306 U. S. 228). In the case at bar we have exactly the opposite situation. Each of the distributors followed its own established practices and methods, and did so voluntarily. They were not restricted by any contracts or agreements with any of the defendant exhibitors.

In the foregoing discussion we have omitted reference to clearance provisions in licensing agreements. The statement heretofore quoted from the Government's brief is misleading in its reference to clearance. The illustration given by the Government was with respect to a town in which A (the circuit) and B (the independent) operate competing theatres. In no instance did any defendant exhibitor ever obtain "clearance" over a competing theatre in the same

town. The only clearance ever obtained by defendant exhibitors was with respect to neighboring towns; and the pleadings in the case, when considered with the bills of particulars, make no issue as to clearance.[6]

In its brief the Government says (p. 57):

> "The defendants also argue (Br. 104-105) that competition between exhibitors is not in the public interest, and that they should therefore not be prohibited from using circuit buying power to restrain competition."

This manner of paraphrasing the argument made in our main brief is typical of the manner in which the Government has tried this case from the outset. Of course, the argument actually made was quite different. Nothing was said about the use of circuit buying power to restrain competition. We deny that circuit buying power has been used in this case to restrain competition.

It is further said in the Government's brief (p. 58):

> "The defendants' argument must also be rejected because it involves the *false assumption* that an exhibitor in a closed town will pass on to the public any saving in the cost of his pictures. If lack of competition enables him to buy cheaper, it much more conclusively enables him to sell higher, that is, to collect higher admission charges from the public. The exhibitor's lower costs because of absence of competition simply go to increase his profits."

This argument is without basis in the pleadings or proof. Contrary to what appears to be the Government's view, the burden of both allegation and proof is on the Government even in a Sherman Act case and a defendant is entitled to reasonable "assumptions" unless and until they are shown to be "false". In this case, there was no contention by the plaintiff that the defendant exhibitors ever charged unreasonable admission prices or that they ever raised

[6] See complaint, R. 1-12; motion for bill of particulars and order, R. 140-153; and bills of particulars furnished in response to the order, R. 153-173. See also our main brief, pp. 22-24.

admission prices after competition in a town had been eliminated. As stated in our main brief (p. 105), the business of exhibiting motion pictures is competitive with other forms of amusement. Indeed, the attendance of places of amusement is in the nature of a luxury rather than a necessity. It is to the selfish interest of the exhibitor to fix admission prices low enough to fill the theatre. As to monopolistic profits, the Government disregards the fact that profits may accrue from competent management, good service to the public, and the like. There is nothing in the case at bar to justify the inference that the profits of the defendants have come from admission prices which were higher than they should have been.

Viewing the matter from a different angle, if the distributors have their will as to film rentals and terms, the exhibitors must absorb the increased cost or pass it on in the form of increased admission prices. The distributors and producers will earn larger profits or will pass on the increased revenue in the form of increased salaries to film stars and other employees. There will be a slight reapportionment of the national income at the expense of Tennessee and in favor of New York and California. But what objective of the Sherman Act will have been attained? As suggested in our main brief (pp. 101-102) the Government ignores in its argument the interpretation given the Sherman Act by this Court in a long line of cases ending in *Apex Hosiery Co.* v. *Leader* (1940), 310 U. S. 469.

The Government next argues (pp. 58-59) that the distributors were not necessary parties because they were not injuriously affected by paragraph (8) and (12) of the decree. This argument is based on the erroneous assumption that the equity principle requiring the joinder of necessary parties is solely for the protection of persons not joined. It is not so limited. In *Williams* v. *Bankhead*, 86 U. S. (19 Wall.) 563, 571, this Court said:

> "Secondly. Where a person is interested in the controversy, but will not be directly affected by a decree

> made in his absence, he is not an indispensable party, but he should be made a party if possible, and the Court will not proceed to a decree without him if he can be reached."

Here the injunction against defendant exhibitors is unfair to them for the reason that the distributors were not also subject to injunctive relief with respect to the licensing of films in competitive situations as compared with closed situations. Nevertheless we must again call to the attention of the Court that although United Artists remained in the case as a party defendant and was found guilty of violating the Sherman Act, no injunctive relief was granted against that distributor.

One basis for the equity rule requiring the joinder of necessary parties who are subject to the jurisdiction of the Court is to avoid a multiplicity of suits. In Story's Equity Jurisprudence, Fourteenth Edition, Sec. 1981, it is said:

> "It is the great object of Courts of Equity to put an end to litigation, and to settle if possible in a single suit, the rights of all parties interested or affected by the subject-matter in controversy. Hence the general rule in equity is, that all persons are to be made parties who are either legally or equitably interested in the subject-matter and result of the suit, however numerous they may be, if they are within the jurisdiction, and it is, in a general sense, practicable so to do."

That the Government's procedure was calculated to bring about a multiplicity of suits is evident from Footnote 51 (Gov. Br. p. 59) in which attention is called to the fact that on August 7, 1944 the Government proposed, in the *Paramount* case, a provision similar to that which it originally sought in this case in paragraph 4 of the prayer.[7] If the Government desired that sort of relief it should have left the "Big Five" in the present case as defendants. In-

[7] R. 11.

stead the Government voluntarily dismissed the "Big Five" as defendants, but persuaded the District Court to enter a decree changing "distributors" to "exhibitors" as found in paragraph 4 of the prayer.[4] Now that the Government has again determined that an injunction against discriminatory licensing practices should operate directly on the distributors themselves, we submit that paragraphs (8) and (12) of the present decree should at least be suspended until such an injunction is obtained.

"There is no Failure of Proof as to Any Essential Allegation of the Complaint."

(Gov. Brief, pp. 60-67)

The Government contends that there is no assignment of error as to failure of proof and that this issue is not open for consideration. We think this is a mistaken view of the assignments of error. Error was assigned on numerous provisions of the decree.[1] If there was a failure of proof as to the essential allegations of the complaint, these provisions of the decree based on a new theory were necessarily erroneous. Our argument as to failure of proof is clearly within the scope of these assignments of error.

Actual and unreasonable restraint of competition was the gravamen of the complaint.[2] We think the complaint specifically set forth, under any fair construction, that there was no actual or unreasonable restraint of competition of any exhibitor so long as that exhibitor had available to him the product of three of the eight major distributors.

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[1] R. 1518-1520.

[2] See particularly paragraphs 40-43, 49 and 54. R. 7-10. It is conceded by the Government (Footnote 53, Gov. Br. pp. 64-65) that the essential allegation of paragraph 43 is covered by the allegations of paragraph 49. The first, third and concluding sentences of paragraph 54 also amount merely to a repetition of paragraphs 43 and 49. The second sentence of paragraph 54 charges that independents were induced by "threats" to sell their theatres. The remaining sentence of paragraph 54,—the fourth,—was stricken on motion of defendants. R. 142, 150, 152.

Otherwise paragraphs 40-42[3] of the complaint are meaningless.

The Government is incorrect in its statement (Gov. Br. p. 63) that the nine "situations" discussed in our main brief relate only to competitors who were "actually put out of business". Item 6 of each of the bills of particulars undertook to specify and give particulars as to each competitor whose competition was unreasonably restrained, as alleged in paragraph 49 of the complaint, even though he was not specified in item 1 which related initially to paragraph 43 of the complaint but also related by reference to paragraph 49.[4] One of the nine situations discussed is that involving the Dixie Theatre in East Gadsden, Alabama, which was still in business at the time of the trial. It so happens that this is the only theatre still in business (1) as to which particulars were given by plaintiff in item 6 of any of the bills of particulars, and (2) as to which proof was then offered which is the basis of a Finding by the District Court of discrimination against such theatre in the licensing of films.[5]

It is true that in item 6 of these bills of particulars plaintiff specified additional theatre operators whose competition was allegedly restrained by inability to obtain sufficient product, but the plaintiff was unable to offer any proof of discrimination against these other independents, viz., Ray Smith, Murfreesboro, Tennessee; James R. Wilson, McMinnville, Tennessee; Rube B. Page, Cleveland, Tennessee; and S. B. Ford, Lexington, Mississippi.[6] There are no Findings against defendant exhibitors in any of these situations.[7] The significance which we attached (in our main brief, pp. 26-27) to the fact that certain other independents mentioned in the Findings are "still in busi-

[3] R. 7.

[4] Main brief; Footnote 5, p. 23.

[5] Main brief, pp. 24-25.

[6] R. 158, 171, 173.

[7] See Exhibit B, Gov. Br. pp. 78-79.

ness" was that, as to them, there were no particulars furnished so as to bring them within paragraph 49 of the complaint, and they did not come within the second sentence of paragraph 54 because that paragraph contained no allegation as to *unsuccessful* "threats".

In its brief (pp. 63-67) the Government undertakes to point out five assumptions or conclusions in our argument which are said to be erroneous. These five points will be referred to in the same order:

(1) It is said (p. 63) that our argument "completely ignores all Findings and proof as to franchise contracts" and that "these alone are sufficient to support the Government's complaint".

It should be noted, however, that the complaint and bills of particulars make no distinction between franchise contracts and other licensing contracts. The Government's case was that, through licensing contracts, independents were deprived of films and their competition unreasonably restrained. The point made in our main brief was that the Government failed to prove these allegations. Certainly they were not proved merely by introducing the franchise contracts in evidence, because defendant exhibitors never had franchise contracts with more than three of the eight major distributors.

(2) Here it is repeated (pp. 63-64) that our argument erroneously assumed "that only proof and findings as to competitors who have been eliminated support the complaint". This point has previously been discussed. Several independents who were still in business were specified by plaintiff in item 6 of the bills of particulars,[8] but there was no proof or Finding as to any of them except the Dixie Theatre, East Gadsden, Alabama;[9] and there was no proof or finding that the competition of the Dixie Theatre had

[8] James R. Wilson, McMinnville, Tenn.; Dixie Theatre, East Gadsden, Ala., R. 171; and S. B. Ford, Lexington, Miss., R. 173.

[9] See Exhibit B, Gov. Br. pp. 78-79.

been unreasonably restrained as set forth in the bill of particulars in which it was mentioned.[40]

(3) It is next argued (pp. 64-65) that bills of particulars do not have the effect of limiting proof to the particulars furnished. Not only are bills of particulars entirely useless if they do not limit or circumscribe the issues, but actually they constitute a snare and a pitfall. Rule 12(e), Federal Rules of Civil Procedure, expressly provides that: "A bill of particulars becomes a part of the pleading which it supplements". That the rule simply adopts a practice of long standing, see *Bank of United States* v. *Lyman*, (C. C. Vt. 1848), 1 Blatch. (U. S.) 297, and authorities there cited. It necessarily follows that paragraphs 43 and 49 of the complaint could properly have been sustained only by proof substantially following items 1 and 6 of the bills of particulars.

Since the first, third and concluding sentences of paragraph 54 amount merely to a repetition of paragraphs 43 and 49,[41] the argument is without merit (Gov. Br. pp. 64-65) that proof outside the particulars became admissible under these allegations though not admissible under paragraphs 43 and 49. A bill of particulars must be treated as supplementing the pleading as a whole. The Government's argument is that if an allegation is repeated two or three times in a pleading, a bill of particulars may limit proof under the allegation found at one place in the pleading but will not limit proof under substantially the same allegation when repeated unless the Court orders the particulars to be repeated. The only essential allegation as to which particulars were not required was the second sentence of paragraph 54, in which it was charged:

> "Independent exhibitors have been induced to sell their theatres to defendant exhibitors under the threat, express or implied, that if they refused to sell, defendant exhibitors would open competing theatres in the same

[40] Main brief, p. 36.

[41] See Footnote 2, *supra*, p. 33.

town and prevent the independent exhibitor from procuring desirable pictures."

No evidence was offered of any "express" threat to prevent any independent from procuring desirable pictures, and there was no Finding that any "implied" threat of that nature induced a sale.

It is further argued by the Government (p. 65) that since no objection was made to the admission of evidence on the ground that it was not within the pleadings, no objection, following trial, can be made on this ground. But the evidence introduced by plaintiff as to alleged discriminations by specific distributors against specific independent exhibitors was relevant on the issues made by the pleadings as supplemented by the bills of particulars. If plaintiff was undertaking to show, for example, that Miller at Rogersville, Tennessee, suffered from a shortage of product, it was certainly relevant to show that he failed to obtain United Artists' product. The trouble with plaintiff's case was not that the evidence offered was irrelevant, but rather that it did not go far enough. Not until the conclusion of plaintiff's case could the defendants raise the question of failure of proof and they did so at that time by making motions to dismiss.[12] We do not understand what other course was open in an equity case tried without a jury.

(4) It is next contended (pp. 65-67) that we have erroneously assumed "that proof of restraint of trade is lacking if it appears from the findings that the pictures of several distributors were or might have been available to the independent". Of course, our argument in this connection was based on the allegations of paragraphs 40-42[13] of the complaint to the effect that, in order to successfully to operate, an exhibitor must be able to exhibit a substantial number of the feature pictures released by three or more of the eight major distributors each year.

[12] R. 937.
[13] R. 7.

The Government's present contention is set forth in Footnote 56 (Gov. Br. p. 66) as follows:

> "Where an exhibitor had been showing in his theatre principally pictures of two or three of the leading distributors, loss of the pictures *of even one of them* might spell the difference between success and failure".

Even if the complaint be construed, however, as alleging such a theory, there was still a failure of proof because there was no evidence and no Finding to the effect, for example, that Miller in Rogersville sold out because he did not get United Artists pictures, or that Lawing in Brownsville sold out because he did not get Loew's pictures. On the contrary Miller testified that when competition came into the town, the prices of pictures went up and for that reason he was unable to operate successfully;[14] and Lawing testified that he began to lose money from the time Crescent's theatre opened, notwithstanding the fact that he was necessarily playing pictures of distributors with whom he had made contracts long before Crescent's theatre opened and had ample product.[15]

In view of the statement that the loss of the pictures of even one distributor might spell the difference between success and failure of an *independent* exhibitor, it is significant that elsewhere in its brief the Government asserts: "The *defendant* exhibitors can procure films adequate to their needs without having those of any particular major distributor". (Gov. Br. p. 57, Footnote 49.)

It is further said in the Government's brief (p. 66) that defendant exhibitors have "obtained important exclusive privileges and preferences from leading major distributors". This statement doubtless means that the distributors have "discriminated" by making deals with defendant exhibitors which have thereby precluded them from licensing the same run to another exhibitor in the same town.

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[14] R. 442.

[15] R. 315. See *supra*, pp. 27-28.

There is not the slightest evidence that the film deals made by defendant exhibitors have been different in any respect from the type of deals made with other exhibitors throughout the country, including the independent exhibitors involved in the case at bar. It is true that franchise agreements have not ordinarily been made by the distributors except with exhibitors having a reputation of stability. It affirmatively appears, however, that Fox entered into franchise agreements with numerous independents.[16] The list included Newport, Tennessee, where J. W. Baird operated as an independent before the organization of Newport Amusements, Inc., and had a Fox franchise.

(5) The Government is not quite fair in asserting that we relied in our main brief upon the failure of the District Court to make any Finding "repeating verbatim the language of the bill of particulars relating to the competitor in question". It is true that in pointing out the failure of the District Court to make Findings in conformity with the allegations, we did quote verbatim the language of the bills of particulars. Our contention is, however, that the District Court made no Finding by the use of any language whatever,—whether in the exact words of the bills of particulars or otherwise,—that any of these theatre operators suffered from a shortage of product and were forced to sell.[17] Of course, no such Findings could have been made because there was no evidence to that effect.

Attention of the Court is invited to the failure of the Government to controvert the argument made in our main brief (pp. 42-43) that the decree in this case is predicated on minor combinations which were not found to have been in furtherance of any one of the nine large conspiracies or combinations alleged in the complaint. In addition to the authorities cited in our main brief see *Terry* v. *United States* (C. C. A. 9, 1925), 7 F. (2d) 28.

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[16] See defendants' exhibit 136, R. 1135, 1347-1348.

[17] If the last paragraph of Finding 127 be regarded as an exception, see Assignment of Error 15 and discussion in our main brief, p. 141; also pp. 60-61.

"The Defendants' General Objections to the Court's Findings Are Unfounded and Immaterial."

(Gov. Brief, pp. 67-73)

Under this heading the Government first refers to Assignment of Error No. 18[1] directed to Findings and parts of Findings predicated upon "unsworn statements," written or oral, made by employees of the distributors. For the convenience of the Court this assignment of error is as follows:

> "18. The Court erred in overruling the following general exception of defendants to the findings and conclusions filed on March 3, 1943:
>
> 'Defendant further excepts to all findings and parts of findings predicated upon unsworn statements, either written or oral, made by employees of distributors and other third persons, upon the ground that such unsworn statements are both hearsay and *res inter alios acta*. Defendant accordingly moves the Court to amend the findings filed March 3, 1943 by eliminating all such findings and parts of findings.'"

This assignment of error was followed by Assignment of Error No. 19[2] directed to the action of the District Court in overruling defendants' motion, made at the conclusion of plaintiff's evidence in chief, to strike the inter-office or inter-company memoranda and correspondence of each of the eight major distributors. Since this motion set forth the documentary evidence from the files of each distributor in separate paragraphs, but in the same language, we will quote only the description in the motion relating to Universal, which was as follows:

> "24. All inter-office or inter-company memoranda and correspondence of Universal. These exhibits were provisionally admitted, subject to being stricken if

[1] R. 1515; also R. 139.
[2] R. 1515; also R. 930, 937-938, 941.

plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Universal, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case."

It is said in the Government's brief (p. 68) that other evidence "fully established the actual discrimination and warranted the inference that the discrimination was induced by defendant exhibitors for the purpose of restraining competition." This argument can be based only upon the theory that the mere negotiation of a circuit deal, including a town where there is competition, warrants the inference of "actual discrimination," and that this inference then warrants the further inference mentioned.

On the other hand it is our view that, before there could be a proper inference of "actual discrimination," there should have been evidence that the independent exhibitor was both willing and able to pay the distributor more than it would receive from the defendant exhibitor in that particular town. In no instance was there such evidence.[3] It is our further view that, even if there had been such evidence, the further inference "that the discrimination was induced by defendant exhibitors for the purpose of restraining competition" would not have been proper unless, at the very least, it was also proved that the defendant exhibitor was aware of the discrimination. Here again there was no such evidence.

It is next argued (pp. 68-69) that the objection to the competency of the evidence is purely technical, because defendants might have cross-examined the authors of these

[3] The Government contends and the District Court found that Lawing's offer at Brownsville was "as good as, if not better than" the Crescent deal; but Lawing's past record indicated grave doubt as to whether he would have complied with his contract, if his offer had been accepted. See *supra*, p. 28.

communications as to the truth of the statements contained in them.[4] As a matter of fact defendants did cross-examine the first such witness along this line, viz., Willingham, who wrote the letter referred to on page 20 of the Government's brief. On the trial, plaintiff's counsel objected to this cross-examination of Willingham on the ground that his direct examination was limited to proof of the fact that he wrote certain letters in the course of his employment. It was argued that cross-examination as to the truth of the contents was outside the scope of the direct examination.[5] Now the Government says that failure to cross-examine subsequent witnesses, introduced for the same purpose, amounts to a concession that the contents of the letters were true. Even as to Willingham, who *was* cross-examined, the Government continues to rely on a letter written by him six months after the event, rather than on Willingham's own testimony on cross-examination which was corroborated by contemporaneous correspondence.[6]

We think the correct rule is that defendants were entitled to cross-examine these witnesses as to the truth of statements made in the letters and reports filed as exhibits by plaintiff, but were not bound to do so at their peril. Plain-

[4] It is also stated in the Governmentt's brief that the authors of the inter-office communications "were friendly to the defendants in this litigation." Doubtless the brief-writer means that, because the distributors had been accused of being parties to an unlawful conspiracy or combination to suppress independent exhibitors, the distributors were desirous of proving their innocence of this charge. But the distributors had no motive to withhold evidence, if any had been available, that defendant exhibitors had attempted, by threats or otherwise, to induce them to discriminate against these independent exhibitors. The distributors have the same complaint against defendants as does the Anti-Trust Division, viz., that defendants have more "sales resistance" than their competitors against the demands of the distributors for high film rentals and onerous terms.

[5] R. 746-749.

[6] R. 751-752, 757-764. The letter relied upon by the Government was introduced on re-direct examination and is found at p. 777 of the record.

tiff's counsel started out to introduce such communications on the theory that a conspiracy or conspiracies would be proved by independent evidence and that these communications would then become relevant as declarations made by co-conspirators in furtherance of the conspiracy or conspiracies.[7] On this theory it was not necessary for either party to prove the truth or falsity of the statements in the communications, because the communications themselves would have become relevant,—provided they otherwise came within the rule,—without reference to whether they were true or false.

The trouble is that the conspiracies were never proved by independent evidence; and the Government now undertakes to rely upon the statements contained in the communications as evidence of the alleged conspiracies or combinations. Following this theory it is necessary for plaintiff to take the fallacious position that the statements contained in the letters were themselves evidence with the same effect as if the writers of the communications had testified in open court to those facts.

It is conceded in the Government's brief (Footnote 58, p. 69) that in at least two of the illustrations referred to in defendants' main brief the writers of the communications were not even introduced as witnesses, viz., J. Emenheiser, who wrote a report referred to in Finding 52 (copied in Footnote 15, pp. 14-15, Gov. Brief), and Reagan, who wrote the letter referred to in Finding 48 (copied on p. 19, Gov. Brief). It is true that there was a stipulation that these letters were written and received, but there was no stipulation that their contents were true.

The following appears in the Government's brief (p. 70):

> "Not only were the distributors charged with being co-conspirators with the defendant exhibitors, but, as the court's findings show, the evidence fully supported this charge except as to Columbia and Universal."

[7] R. 368.

We respectfully challenge this statement. When the Findings are considered in connection with the Conclusions, it is clear that the District Court found that there was no "conspiracy" but only isolated "combinations" between individual distributors and individual exhibitors. With respect to United Artists the Court specifically said in Conclusion 17:[8]

> "There is no evidence that United Artists entered into a conspiracy with either Crescent, Rockwood, Cumberland, Sudekum, Stengel or Rosenbaum in any of these matters, yet to hold there was no discrimination in either of the above instances, would be ignoring the plain facts."

The Court accordingly concluded that United Artists had violated the Sherman Act by "combining" with Cumberland to eliminate Miller's competition at Rogersville.

This conclusion was necessarily based on Finding 52[9] in which the District Court relied mainly upon the report of J. Emenheiser, United Artists salesman. The Government now contends, in effect, that if the discrimination and combination are proved by the salesman's report, the report then becomes competent on the theory that the combination has been proved. Of course, the fallacy of this argument is that the combination was not proved by independent evidence. The only other evidence was the testimony of Richardson, United Artists Branch Manager in Atlanta, that he licensed the 1936-1937 product to Cumberland for its Rogersville theatre so that he could make a deal with Cumberland for the other towns in which that circuit operated.[10] There was absolutely no evidence, however, that Miller was willing and able to pay more for the United Artists pictures than Cumberland paid for Rogersville alone.

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[8] R. 1477-1478.

[9] R. 1384.

[10] In no other instance of alleged discrimination was there testimony corresponding to that of Richardson.

Two cases are cited in the Government's brief (pp. 70-71) to the effect that the declarations of an officer or employee of a distributor, acting on behalf of his corporate principal and within the scope of his authority, are the declarations of the distributor for whom he acts. These were not conspiracy cases. The Government has cited no case to the effect that every officer and employee of a corporation is a conspirator merely because the corporation itself, acting through other officers or employees, has become a party to a conspiracy. There was no evidence in the case at bar that the writers of any of these communications were the officers or employees of the respective distributors through whom those corporations had entered into the alleged conspiracies or combinations with any defendant exhibitor.

The next assignment of error discussed in the Government's brief (pp. 71-73) is No. 17,[11] which was as follows:

> "17. The Court erred in overruling the following general exception of defendants to the findings and conclusions filed on March 3, 1943:
>
> > 'Defendant excepts not only to the findings hereinbefore specifically conferred to, but to all findings and parts of findings adopted from the Government's brief and to the conclusions based upon such findings, upon the ground that the method thus used was improper and unfair to defendant exhibitors and did not constitute a weighing of the evidence by the Court. A copy of the Government's said brief is filed herewith as a part of these motions and reference made to same for purposes of comparison. Defendant accordingly moves the Court to amend the findings filed March 3, 1943 by eliminating all such findings and parts of findings.' "

It will be noted that defendant exhibitors excepted not only to the Findings adopted from the Government's brief, but also to the Conclusions based upon such Findings. The Conclusions upon which the decree against defendant ex-

[11] R. 1514-1515; also R. 139.

hibitors was predicated were based entirely on Findings adopted from the Government's brief,[12] to the extent that said Conclusions may be said to have been based at all upon the Findings. It is true (Gov. Brief, p. 72) that there were a substantial number of Findings not based upon any language in the Government's brief. With few exceptions, however, these were the Findings relating to Columbia, Universal and United Artists. To the extent that they related at all to defendant exhibitors, they did so indirectly and not by design. Some of these Findings were inconsistent with the Findings which directly related to defendant exhibitors and were adopted from the Government's brief.[13]

Not only were the Findings as a whole, to the extent that they were against the defendant exhibitors, adopted from plaintiff's brief, but the findings of discrimination were clearly intended by both plaintiff and the District Court to be based mainly upon inter-office or inter-company memoranda and correspondence of the distributors.[14] If Assignments of Error Nos. 17, 18 and 19 are sustained, the whole decree goes out. We think those assignments must necessarily be sustained for the reasons set forth herein and in our main brief.

"The Evidence in Support of Findings to Which Specific Error Has Been Assigned."

This subject is relegated in the Government's brief to Appendix A. We shall not undertake to repeat the discussion of these assignments of error contained in our main brief. The comments made in the Government's brief afford no basis for a holding that the Findings of the District Court are supported by competent evidence.

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[12] R. 1522.

[13] Compare the third paragraph in Finding 39 (R. 1373) which was taken from the Government's brief, with Finding 154 (R. 1462) and Finding 173 (R. 1470). Also compare Finding 99 (R. 1424) which was not taken from the Government's brief, with the next to last paragraph in Finding 100 (R. 1425).

[14] In this Court the Government argues that even if this evidence was incompetent, the findings are supported by inferences from other evidence.

It will be noted that the Government undertakes to uphold these Findings on the theory that the Findings made the basis of specific assignments of error are "permissible inferences" either from other Findings as to which specific error was not assigned, or from letters quoted in the Findings. However, these other Findings were, in every instance, included in Assignments of Error Nos. 17, 18 and 19. Furthermore, this piling of inference on inference violates fundamental principles as to burden of proof and the presumption of innocence.[1] Take, for example, the portion of Assignment of Error 11 relating to the finding that "pressure" by Sudekum was responsible for the fact that prints were made available to Crescent's Alabama City theatre, the Ritz, before they were made available to the independent suburban theatre in East Gadsden, known as the Dixie. The Government still insists (p. 76) on a so-called "obvious inference," which is directly contrary to undisputed testimony.[2]

CONCLUSION.

In our main brief we emphasized the variance between the theory of the complaint and the theory of the decision. In one respect, however, the complaint and the decision were consistent,—the gravamen of the case was still the alleged injury to so-called independent exhibitors. Nowhere either in the complaint or in the Findings is there any suggestion of injury to the theatre-going public. On the contrary, the evidence was that defendants operate comfortable and modern theatres in many very small towns where, if the field were left to the so-called independents,

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[1] Main brief, pp. 67-68.

[2] Main brief, pp. 95-96. The *absence* of clearance provisions in favor of Alabama City are regarded in the same light as the absence of the Knave's signature on the document introduced in evidence in Chapter XII of Alice in Wonderland:

> "Please, your Majesty," said the Knave, "I didn't write it, and they can't prove that I did: there's no name signed at the end."
>
> "If you didn't sign it," said the King, "that only makes the matter worse. You *must* have meant some mischief, or else you'd have signed your name like an honest man."

there would probably be no theatres at all or exceedingly poor ones.

In a case reported since our main brief was filed, *Hunt v. Crumboch* (C. C. A. 3, 1944) 143 F. (2d) 902 (Advance Sheets of Sept. 25, 1944), plaintiffs sought treble damages on the theory that an unlawful combination of defendants had caused them to go out of business, which was that of transporting produce and food stuffs. In affirming the judgment of the District Court dismissing the complaint the Circuit Court of Appeals said (p. 904):

> "We must assume, for nothing to the contrary appears in the plaintiffs' case, that the number of haulers available to haul produce and foodstuffs was not diminished but simply that some other hauling concern took over the work formerly performed by the plaintiffs and that there was no increase in the cost of hauling traceable to the acts of the defendants in eliminating the plaintiffs from the field. It is in the public interest that the supply of commodities and services be undiminished and the cost not increased. From the standpoint of the public, however, it is immaterial whether the plaintiffs or others provide the services."

In the case at bar it seems equally clear that, from the standpoint of the public, it is immaterial whether defendants exhibit particular motion pictures or whether they are exhibited by so-called independents. The public concern is with the cost and character of service rendered and there was no charge against defendants in this case in these respects.

It is therefore somewhat surprising that in its brief in this Court the Government undertakes to make an argument based on the public interest (e.g. Footnote 34, p. 41). In making this argument the Government is forced to ignore the complaint, the evidence and the Findings and predicate the argument on unproven assumptions. We think that the case should be decided on the theory on which it was originally brought and on the record in the case.

It is respectfully submitted that plaintiff's assignments of error should be overruled, the assignments of error of defendants sustained, and the case reversed and dismissed.

Respectfully submitted,

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October 4, 1944.